MOTION FILED
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No. 84-1880

IN THE

Supreme Court of the United States

October Term, 1984

CITY OF ALCOA and DAVID SWITZER, manager of Blount Electric System and employee of the CITY OF ALCOA
Petitioners

v.

ELIZABETH MYERS, on behalf of herself and her three minor children, DEBBIE LYNN DIXON, JOHN GARFIELD DIXON, JR., and CONNNIE SUE DIXON,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE TENNESSEE VALLEY PUBLIC POWER ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION OF THE
TENNESSEE VALLEY PUBLIC POWER ASSOCIATION
FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE
IN SUPPORT OF THE PETITION
OF THE CITY OF ALCOA, ET AL.
FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Tennessee Valley Public Power Association ("TVPPA") respectfully asks leave of the Court, pursuant to Rule 36, to file, as an amicus curiae in this case, the "Brief of Amicus Curiae Tennessee Valley Public Power Association in Support, etc.", filed conditionally this date, and appended to this motion. In support of its motion, TVPPA would show the Court that:

1. TVPPA is a non-profit Tennessee Corporation whose membership is composed of 157 of the 160 municipal and cooperatively owned, non-profit electric distribution systems that purchase electric power at wholesale from the Tennessee Valley Authority ("TVA"), an agency of the United States. These electric distribution systems are located in the TVA service area, which includes parts of Tennessee, Kentucky, Alabama, Georgia, Mississippi, North Carolina, and

Virginia. TVPPA's purpose is to promote the joint interests of its member systems and to act on their behalf in matters of joint concern, including those involving policies concerning the extension and termination of electric service, and the procedures incident to the extension and termination of electric service, which are at issue in this case. The ratepayers of the member systems of TVPPA own their respective distribution systems, either directly or through the municipalities of which they are citizens. The municipal electric system of the City of Alcoa is a member of TVPPA. TVPPA was authorized to seek leave to file a brief amicus curiae in this case by its Board of Directors on April 29, 1985.

2. TVPPA and its members are so situated that the disposition of this action may have a serious adverse impact upon their interests. TVPPA shares the concern of the City of Alcoa that the opinion of the Court of Appeals provides unwarranted protection to what is not a property interest under Tennessee law. In addition, as set forth in more detail in the accompanying brief, TVPPA is

particularly concerned that the opinion of the Court of Appeals may serve to establish due process requirements with respect to the termination of electric service that will impose undue burdens upon the 107 municipally-owned members of TVPPA.

3. Should the judgment of the Court of Appeals stand unmodified, many members of the TVPPA would be severely hampered in their efforts to combat energy theft. If the members of TVPPA were unable to protect their members from energy theft in a timely and effective manner, the resulting losses would necessarily be borne by the citizen ratepayers served by TVPPA's member systems. TVPPA thus has a direct interest in the subject matter of this action, and the disposition of this action may as a practical matter impair the ability of TVPPA, and its members, to protect that interest.

Accordingly, TVPPA respectfully requests leave of the Court to file the accompanying Brief of Amicus Curiae Tennessee Public Power Association in this matter.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE
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INTERESTS OF AMICUS CURIAE

Consent to the filing of this brief was refused by counsel for the plaintiff-respondents, Elizabeth Myers, et al. Accordingly, this brief is submitted conditionally, accompanied by a motion seeking leave that it be filed, pursuant to Rule 36.1 of this Court.

As set forth in the Motion referred to, the Tennessee Valley Public Power Association ("TVPPA") is a nonprofit Tennessee corporation whose membership is composed of 157 of the 160 municipally and cooperatively owned nonprofit electric distribution systems that purchase electric power at wholesale from the Tennessee Valley Authority ("TVA"), an agency of the United States. These electric distribution systems are located in the TVA service area, which includes parts of Tennessee, Kentucky, Alabama, Georgia, Mississippi, North Carolina, and Virginia. TVPPA's purpose is to promote the joint interests of its member systems, and to act on their behalf in matters of joint concern. In the context of the instant case, TVPPA is concerned that the

decision of the Court of Appeals will place unreasonable, unrealistic, and unjustified burdens on the 107 municipal electric systems that are members of TVPPA.

The decision of the Court of Appeals purports to set forth due process standards for the termination of electric service in cases in which electric service is being stolen at the residence of the recipient of the benefit of the stolen power. TVPPA believes that the Court of Appeals established these due process standards without an adequate review of the particular benefits and burdens that the implementation of such standards in the context of theft of power cases would entail, and TVPPA believes that an examination and weighing of these benefits and burdens is necessary to establish the proper due process standard to be applied in cases of theft of power.

TVPPA supports the position of the City of Alcoa that the plaintiff-respondents in this action, Elizabeth Myers, et al., had no protected property interest in the continued receipt of electric service under the particular circumstances of this case. This argument

has been adequately advanced in detail by the City of Alcoa in its petition before this Court. In this brief, TVPPA wishes to highlight for the Court's attention the particular problems posed by the failure of the Court of Appeals to make an adequate evaluation of the benefits and burdens flowing from the due process standard that it has mandated. The failure not only poses risk to the City of Alcoa, but also to other municipal electric distributors, many of whose individual circumstances may differ markedly from that of the City of Alcoa. The analysis of the Court of Appeals fails to consider such differing circumstances or to appreciate this diversity, and thus threatens to impose unreasonable and unjustified burdens upon the municipal electric distributors who are members of TVPPA.

SUMMARY OF THE ARGUMENT

The Court of Appeals set forth a due process standard for the termination of electric service in cases involving theft of electric power. The Court of Appeals established this due process standard

without an adequate analysis of the particular benefits and burdens that would flow from the implementation of such a due process standard, and without an adequate record upon which to make such an analysis. The imposition of a standard of due process without examination of the factual circumstances of the particular case before the Court is contrary to the principles established by the cases decided by this Court. No such due process standards should be imposed without permitting the City of Alcoa to establish a record in the District Court showing the relative benefits and burdens that the implementation of particular due process procedures would entail.

ARGUMENT

The memorandum decision of the District Court Judge from which plaintiffs Ms. Myers, et al., appealed is included as Appendix C in the Petition of the City of Alcoa. As noted by the District Judge, the case was "before the Court on Defendants' [City of Alcoa, et al. (hereinafter Alcoa)] motion for summary judgment." Previously,

the motion of the plaintiffs for summary judgment had been denied, and the plaintiffs did not appeal from that denial. The District Judge granted the motion of Alcoa for summary judgment, finding that the plaintiffs had been deprived of no property interest entitled to due process protection.

In reaching that conclusion, the District Judge had no cause to consider, or to address the adequacy of, the procedures actually employed by the City of Alcoa in terminating the electric service of the plaintiffs. By finding that the plaintiffs had no protected property interest in the continued receipt of electricity under the stipulated facts, the District Judge found that the plaintiffs had no cause of action regardless of the procedures employed by the defendants or what other facts might be shown.

The Court of Appeals reversed. In an extended discussion, the Court of Appeals determined that the plaintiffs had a right to the receipt of continued electric service that rose to the dignity of a "protected property interest", of which the Court concluded the plaintiffs had been

deprived when their electric service was terminated by Alcoa. TVPPA fully concurs with the position of Alcoa that this holding is incorrect and agrees with the discussion of this point by Alcoa in its Petition to this Court.

The determination by the Court of Appeals that there was a property interest in the stolen electricity removed the basis for the District Court's grant of summary judgment in favor of the defendants, leaving a blank slate. The proper procedure would then have been to remand the case to the District Court for a trial on the merits, or such other proceedings as might prove appropriate. The Court of Appeals did not remand for a trial on the merits. Rather, it went on to make a finding on liability in favor of the plaintiffs and remanded for a trial on the question of damages only. The Court of Appeals held that Myers was, at a minimum, entitled to notice and a hearing before electric service was terminated. As it had been stipulated that no pretermination hearing had been granted, the Court of Appeals presumably believed that this holding was an inescapable question of law.

However, in its finding of liability, the Court of Appeals had actually passed upon a question of fact, not of law. Once a protected property interest has been found, the adequacy of the procedures put in place to protect that interest is, initially, a question of fact, to be determined in part by a consideration of the circumstances of the particular case. Due process is a flexible standard, and its precise requirements vary with the exigencies of the particular situation. As noted in the case of Mathews v. Eldridge, 424 U.S. 319 (1976), the nature of the judicial or administrative process required in a given case calls for a consideration of:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of that interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interests, including the function involved and the fiscal

> and administrative burdens that the additional or substitute procedural requirements would entail.

424 U.S. at 355.

In holding that the plaintiffs were entitled to a pretermination hearing, the Court of Appeals failed to employ this analysis correctly, and failed to appreciate the factual issues that a proper consideration of the factors set forth in Mathews v. Eldridge raises.

Assuming, for the purposes of argument only, the possession by the plaintiffs of a protected property interest in the continued receipt of stolen electric service, the problems with the analysis employed by the Court of Appeals begin with the second Mathews v. Eldridge factor, the "risk of erroneous deprivation . . ." At no point does it appear that the Court of Appeals considered the risk of error inherent in a procedure which fails to provide a pretermination hearing. Rather, the Court of Appeals appeared, first, to have mistakenly concluded that the risk of error in the procedure employed by Alcoa must be

unacceptably high because it produced an incorrect result in this particular case. Next, the Court of Appeals appeared to support this conclusion by its estimate of the impact an error would have on the parties, considerations more relevant to the other prongs of the Mathews test. Amicus curiae suggests that this is a clear misapplication of this prong of the Mathews test.

That a particular procedure in fact results in mistaken deprivation in one case does not establish that the risk of erroneous deprivation entailed in the use of the procedure is unacceptable. As noted by this Court in Mathews, ". . . procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of the cases, not the rare exceptions". Mathews v. Eldridge, 424 U.S. 319, 344 (1976). Nothing in either Mathews v. Eldridge, 424 U.S. 319 (1976), or the other opinions of this Court suggests that the administrative procedures adopted must always be error-free and never result in an erroneous deprivation. "The Fourteenth Amendment does not guarantee that all

decisions by state officials will be correct. . ." Lavine v. Milne, 424 U.S. 577, 587 (1976).

The Court of Appeals had no record upon which to consider the many factual questions that a proper consideration of the issue of risk demands, and thus passed over it cursorily. But what is the risk of erroneous deprivation in the failure to give a pretermination hearing to a person receiving admittedly stolen electric power? Neither the Court of Appeals nor the parties question the obvious right of Alcoa to terminate electric service without a hearing if the plaintiffs had been themselves culpable of the theft. Thus, the question becomes, in what percentage of those cases of admitted theft of electricity will it be found that the person receiving the direct benefit of the stolen power has no knowledge of or involvement with the theft? It is this percentage, whatever it might be, that gives the "risk of erroneous deprivation", for only in those cases can the lack of a pretermination hearing have any deleterious impact on the customer. What is that risk? There is no evidence in this

record from which it can be determined. Logic suggests that it is small. Certainly, that has been the judgment of the Tennessee Legislature, which has created a legislative presumption that the recipient of the benefit of stolen power is guilty of theft. See T.C.A. §§ 39-3-938, 39-3-939. However, the record contains no facts upon which a reasoned judgment of the risk of erroneous deprivation can be based.

A second facet of this prong of the Mathews test, one not touched upon by the Court of Appeals, is "the probable value, if any, of additional or substitute procedural safeguards". Here, the additional safeguard mandated by the Court of Appeals is a pretermination hearing. To what extent will the institution of this particular procedure reduce the risk of erroneous deprivation? Again, the record is devoid of any evidence to support a finding on this point. However, the value of a pretermination hearing in a case involving admitted theft of power certainly is not readily apparent. It must be kept in mind that we are dealing only with cases in which the fact of theft is undisputed; the only possible question is

the involvement in that theft of the recipient of the stolen power. How will a pretermination hearing distinguish between recipients who are thieves and those who are not? As theft of power is a criminal offense, can it not be expected that all recipients of stolen power, both innocent and guilty, will protest their innocence? Furthermore, what is the scope of the pretermination hearing that would be required to provide any reasonable basis upon which to distinguish the guilty from the innocent? Only by knowing this scope can one decide whether or not the cost of the procedure to be implemented will be balanced by the benefits that flow from it. There is no basis in the record for deciding these questions, and it was error for the Court of Appeals to implicitly dismiss them out of hand.

The Court of Appeals appears to have assumed that, because Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978), required notice and a hearing in connection with an ordinary billing dispute, notice and a hearing were similarly required in a case of theft of power. As Judge Wellford of the Court of Appeals noted in his

concurrence with the Order of the Court of Appeals on the petition of Alcoa for a rehearing, included as Appendix B to the Petition of Alcoa before this Court, such an assumption is not necessarily warranted. A case involving theft of power is not the same as one involving a billing dispute, and at a minimum the case should have gone back to the District Court so that evidence of those differences could be considered.

The Court of Appeals also failed to appreciate the complexities inherent in making a judgment as to the administrative and fiscal burdens which the implementation of the mandated procedure would place on the utility, dismissing the question with the comment that the existing hearing mechanism designed to adjudicate conventional billing disputes could be employed with no additional burden to Alcoa. Such an assumption is unwarranted. As noted previously, it is not at all obvious that a procedure designed to resolve run-of-the-mill billing disputes and misunderstandings will be of any use in separating the innocent from the guilty in cases involving theft of power. There is

no discussion at all of what uncompensated loss the municipal power system could be expected to suffer by continuing to provide electric service to all in cases involving theft of power, pending a hearing to give the recipient of the theft an opportunity to claim innocence. The Court of Appeals alludes to the right of the defendants to pursue civil remedies to recover the charges for the power stolen, but there is nothing in the record to suggest that such civil actions are cost effective.

Once it is realized that the problems and costs posed by theft of power cases are not necessarily those presented in an ordinary billing dispute, and that the equivalence between the two assumed by the Court of Appeals does not in fact exist, there is no evidence in the record sufficient to support a reasoned judgment as to the fiscal and administrative burdens that the procedure required by the Court of Appeals would place on the municipal utility.

Certainly, there are numerous situations in which the deprivation of a protected property interest without a predeprivation hearing does not violate

due process requirements. The defendants have cited a number of illustrative cases in their Petition before this Court at pages 11-12. The holding by the Court of Appeals that such a predeprivation hearing was required in this case was grounded upon a number of assumptions for which there exists no basis in the present record. On the state of the record before it, the Court of Appeals could have decided, at most, that it could not be said as a matter of law that the lack of a pretermination hearing would be acceptable in all possible circumstances. The record does not justify the leap from that conclusion to the holding of the Court of Appeals that a pretermination hearing is always required. The decision of the Court of Appeals threatens to impose an unreasonable and unjustified administrative burden not only on the City of Alcoa, but on other municipal distributors of electric power.

CONCLUSION

For the reasons stated, amicus curiae the Tennessee Valley Public Power

Association asks that the Petition for Writ of Certiorari of the City of Alcoa, et al., be granted.

Respectfully submitted this 28th day of June, 1985.

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